

# PUBLICATION

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## 10 Tips to Lower Your Long Term Care Litigation Costs

**Authors: Christy T. Crider**  
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The reality of caring for our elderly in today's litigation climate is that eventually your long term care facility will get sued. Full-page newspapers ads, expensive television spots and billboards target nursing homes and encourage families to go see a lawyer. Long term care providers give great care, but our charts are never perfect. Litigation ensues and it gets expensive. Over the past 15 years of defending long term care cases, I have learned a thing or two, or ten, about how facilities can keep costs down.

### **1. Provide an accurate and complete chart to the family's attorney and your attorney the first time they ask.**

In long term care, we live and die by our medical charts. Often, the very first sign of potential litigation is a medical records request. I cannot over stress the importance of making sure that you provide a complete and accurate chart to the requesting attorney. Equally important, when your own counsel is hired, she should also be provided an accurate and exact duplicate of the original. I have spent countless hours comparing the chart provided to the plaintiff's attorney to the chart provided to the defense attorney, and then to the original, and all three were different. The fact of the matter is that with hundreds of pages of documents kept in various places in the facility and charted on by numerous people, pages go missing. One missing page of your chart can affect the value of your case by six figures; I have seen it happen.

### **2. Set realistic expectations with family members before admission.**

After a lawsuit is filed, I often take the depositions of the family members who admitted the resident to the facility. It is rare to find a family member who is objective about the long term prognosis of their loved one. They are rightfully filled with hope, which often results in unrealistic expectations for the likely outcome for their elderly loved one. Although the conversations are never easy, it has been my experience that frank and realistic discussions at the time of admission with the family and the doctor cut down on lawsuits significantly. When a family member understands that the resident is likely to develop pressure sores or to fall, they are not shocked when that happens. I have seen lots of family guilt inappropriately directed at the caregivers who care for their loved one. Helping families have realistic expectations is the very best way to save on litigation costs.

### **3. Add an arbitration agreement in your admission packet.**

Arbitration is an alternative to a jury trial where both parties agree to have a neutral third party decide their dispute rather than go through an extensive court proceeding. There is most often no right to appeal, except in the instance of fraud, so both parties get closure more quickly and less costly. I have arbitrated three nursing homes cases, and in all three the family and facility both felt it was a fair and efficient process to resolve their dispute. In addition, the litigation costs were cut by about one-third.

### **4. Treat your quality assurance documents like quality assurance documents.**

We spend a lot of time in nursing home litigation battling over what documents should be protected by the quality assurance privilege and which are not and must be produced. I see this often with incident reports, incident investigations, skin and weight committee meeting minutes, quality assurance meeting minutes, safety committee meeting minutes, employee reprimands and the list goes on. The quality assurance laws vary from state to state, and you should consult with your attorney about how to best protect your QA documents. However, if your policy and procedure is clear and you follow it, you will save money.

## **5. Keep families informed.**

In well over half of the lawsuits I defend, families testify under oath that they did not know about significant events that occurred with their loved ones within a reasonable time after they happened. Sometimes these family members tell me they did not know until the hospital told them (for example, that their loved one has a pressure sore). Sometimes they tell me that they did not know a significant event happened until they heard it several weeks later from a CNA (like in an elopement). Sometimes they tell me they did not know a significant event happened until they sued and got a copy of the chart and saw it there (like a fall). By the way, all three of those are real examples from my cases in the last year. When families understand what is going on in a timely way, they are less likely to sue.

## **6. When your attorney schedules caregiver interviews at the facility, set a good schedule and keep them on track.**

A great defense of a long term care case involves meeting with each of the key caregivers who appear in the resident's chart. In my firm, we send a list of the key caregivers to the facility and ask the facility to schedule caregiver interviews in approximately 25-minute increments, and to provide us with the last known addresses of the key former caregivers. The best way to keep costs down is to get night shift caregivers in during the day, make sure everyone comes at the appointed time, and get the schedule to the attorney at least a week ahead of time. We can sometimes clip through 15 or 20 caregiver interviews in one day if we have a super-organized facility. It gets costly when we have to come back four or five times to pick up the stragglers who do not come in at the appointed hour. We do not mind doing it to accommodate, it is just more expensive for the clients.

## **7. Respond to interrogatories and requests for production of documents in an organized and timely fashion.**

Any of you who have been through a lawsuit know that your attorney will send you a long list of questions that need to be answered and documents that need to be compiled in order to respond to discovery. In the process, you have probably "discovered" that discovery is burdensome and expensive. When I receive documents back from a facility in a timely fashion that are organized by question number in file folders and labeled, the costs of discovery go down dramatically. When I receive faxes piece-meal over the course of three months, not labeled, not identified and incomplete, the costs of discovery go up substantially as we chase down documents and try to understand what has been sent.

## **8. Show sympathy after a major event or a resident's passing.**

We live in such a litigious world that people are afraid to express sympathy for fear of admitting fault. I have litigated many long term care cases where the family expressed a great deal of anger during the lawsuit that nobody ever expressed sympathy for what happened to their loved one. Flowers, cards, and most importantly, in-person visits and kind words go a long way with families. It often dissuades them from suing because they recognize that you really loved their family member just as they did. In one of my arbitrations, we were leaving the room after a hard day of testimony, and my client said to the family "I am so sorry for your loss." The response was "Thank you. You are the first person from the facility to say that to me."

## **9. Encourage early case evaluation and resolution.**

Most often, your attorneys will control the pace of the case. When they know that you are open to early resolution and you encourage them in that regard, costs go down substantially. It has been my experience that most cases can be evaluated and a reasonable value determined in the first three to six months. If a pass at resolution can be made early in litigation, costs are cut.

## **10. Organize "the shed!"**

Al Capone's body is probably buried in a nursing home shed somewhere, and that is why it has never been found. When I ask for documents and I hear the infamous words, "We'll have to look through the shed," I know that things are about to get expensive. Sheds, in my experience, are where unorganized documents go to get

lost. When the going gets tough, I have sat in sheds hunting for documents myself. As you can imagine, that is not cheap.